



November 4, 2008

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Written ex parte communication: ISP Remand proceeding
CC Docket Nos. 01-92; 96-98; and 99-68

Dear Ms. Dortch:

Yesterday the Commission deleted from the agenda for today's meeting the comprehensive item addressing intercarrier compensation and universal service reform,¹ and Chairman Martin indicated that the Bureau has been directed to draft a stand-alone order addressing just the remand of the Commission's rules setting the rates for ISP-bound traffic,² per the D. C. Circuit's recent *Mandamus Order*.³ Sage urges the Commission to adopt a legally sound order supporting the ISP rate in time to comply with the *Mandamus Order*.⁴

The record in this proceeding is enormous, but it provides a wealth of support, from both legal and policy perspectives, for the Commission's ISP-bound traffic rules. In particular, the record demonstrates that:

- ISP-bound traffic is interstate traffic.
- Under section 251(i), the Commission retains jurisdiction under section 201 to set rates for interstate traffic that is otherwise subject to section 251(b).
- The Commission's ISP rate regime is, and always has been, a lawfully adopted pricing rule for interstate traffic.

These points are fleshed out below.

¹ "Deletion of Agenda Item from November 4, 2008, Open Meeting," Public Notice (rel. Nov. 3, 2008).

² Statement of FCC Chairman Kevin J. Martin on Intercarrier Compensation and Universal Service Reform (rel. Nov. 3, 2008) ("Martin Statement").

³ *In re Core Communs. Inc.*, 531 F.3d 849 (D.C. Cir. 2008) ("*Mandamus Order*").

⁴ In this regard, the Court stated:

For the foregoing reasons, we grant the writ of mandamus and direct the FCC to respond to our 2002 WorldCom remand by November 5, 2008. That response must be in the form of a final, appealable order that explains the legal authority for the Commission's interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5). No extensions of this deadline will be granted. The rules are hereby vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date. This panel of the court will retain jurisdiction over the case to ensure compliance with our decision.

Mandamus Order, 531 F.3d at 861-62.

ISP-bound traffic is interstate traffic. During oral argument in *WorldCom*, two judges rejected the claim that the *Bell Atlantic*⁵ court had rejected the applicability of the end-to-end approach for purposes of determining which compensation regime applied to a particular traffic stream. These judges noted that the earlier decision had been “rigorously agnostic” on this point, and that a contention to the contrary could not “pass the straight face test.”⁶ Moreover, as Sage has previously observed, any questions about the Commission’s use of end-to-end analysis have been put to rest in the Commission’s subsequent decisions classifying other types of Internet access – which all conclude that connections to the Internet are to be analyzed as integrated (and thus interstate) communications paths, and that this analysis governs both jurisdictional and compensation-related questions.⁷ This line of analysis can be seen in the Commission’s analysis of cable,⁸ wireline,⁹ and wireless¹⁰ broadband Internet access traffic, which was affirmed by the Supreme Court in *Brand X*. This same analysis underlies the Commission’s jurisdictional analysis of interconnected VoIP traffic in the *Vonage Order*¹¹ and the Commission’s decision to assess universal service contributions on interconnected VoIP traffic.¹² It also underlies the Commission’s analysis of the proper treatment of calling-card traffic, for both universal-service and intercarrier-compensation.¹³

All of these decisions rest on the assumption that Internet traffic continues onto the Internet, which is inherently interstate and international in nature. There is no reason to “retain[] artificial and unsupported distinctions between types of Internet traffic”¹⁴ such as dial-up versus broadband. ISP-bound traffic continues on to the Internet and is thus interstate traffic.

⁵ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D. C. Cir. 2000) (“*Bell Atlantic*”).

⁶ *WorldCom, Inc. v. FCC*, Nos. 01-1218, et al. (D.C. Cir. argued Feb. 12, 2002).

⁷ Sage ex parte letters, CC Docket Nos. 01-92 and 99-68 (filed May 9, 2008, and Aug. 14, 2008) (“Sage Ex Partes”). See also Qwest ex parte letter, CC Docket Nos. 96-98, 99-68, and 01-92 (filed Sept. 24, 2008) at 5-6.

⁸ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4832 ¶ 59 (2002) (noting that relevant factor was “the location of the points among which cable modem service communications travel”), *aff’d* *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”).

⁹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, et al.*, CC Docket No. 02-33 et al., Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”).

¹⁰ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5911 ¶ 28 (2007).

¹¹ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22413 ¶ 17 (2004) (“*Vonage Order*”), *aff’d* *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

¹² *Universal Service Contribution Methodology et al.*, 21 FCC Rcd 7518, 7546 ¶ 56 (2006) (“*2006 USF Contribution Order*”).

¹³ *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, 20 FCC Rcd 4826, 4827 ¶ 5 (2005) (rejecting “AT&T’s argument that the communication of [an] advertising message [by the platform prior to transmission of the call to a third party] creates a call endpoint at the switching platform, thereby dividing a calling card communication into two calls.”).

¹⁴ Martin Statement at 1.

The Commission has jurisdiction to set rates for all interstate traffic. Section 201 establishes the Commission's plenary jurisdiction over interstate traffic.¹⁵ Core asserts that this authority "provides no basis for excluding telecommunications traffic to ISPs from § 251(b)(5),"¹⁶ but in this assertion Core overlooks section 251(i) of the Act, which specifically provides that "[n]othing in this section [251] shall be construed to limit or otherwise affect the Commission's authority under section 201."¹⁷ Given that ISP-bound traffic is jurisdictionally interstate, it falls under the Commission's section 201 ratemaking authority through the section 251(i) savings provision.¹⁸

The Commission's ISP rate regime is, and always has been, a lawfully adopted pricing rule for interstate traffic. The Commission's decision in the *ISP Remand Order* to move compensation for ISP-bound traffic towards bill-and-keep, with a current intermediate stop at \$0.0007 per minute of use, was a well-thought-out conclusion based on cogent consideration of facts and policy which remains both factually accurate and legally sound today.¹⁹ In remanding the decision, the D.C. Circuit took pains to note that it did *not* decide "that the interim pricing limits imposed by the Commission are inadequately reasoned," or indeed *any* issues "other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5)."²⁰ Once the Commission corrects the underlying legal rationale, the rule should stand on both a prospective and retrospective basis.

Sage urges the Commission to adopt a sound rationale (such as the one above) that supports the ISP rate rule from the time of its adoption in time to comply with the *Mandamus Order*.

Sincerely,

/s/

Robert W. McCausland
Vice President

cc (via email): Hon. Kevin Martin; Hon. Michael Copps; Hon. Jonathan Adelstein; Hon. Deborah Taylor Tate; Hon. Robert McDowell; Amy Bender; Scott Deutchman; Scott Bergmann; Greg Orlando; Nicholas Alexander; Dana Shaffer; Donald Stockdale; Randolph Clarke; Marcus Maher; Albert Lewis

¹⁵ 47 U.S.C. § 201.

¹⁶ Supplemental Ex Parte of Core Communications, Inc., CC Docket Nos. 99-68 and 01-92 (filed Oct. 28, 2008) at 3.

¹⁷ 47 U.S.C. § 251(i).

¹⁸ See generally AT&T ex parte letter, CC Docket Nos. 01-92, 96-98, and 99-68 (filed May 9, 2008) at 2-6.

¹⁹ See, e.g., Sage Ex Partes at 4 (noting *inter alia* that nearly half of Sage's customers' local usage is to ISPs).

²⁰ *WorldCom, Inc v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).